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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. ~~878~~ 131

FREDA GOODMAN,
Petitioner,

vs.

CITY OF CHICAGO,
a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION, AND BRIEF IN SUPPORT THEREOF.

(PETITION FOR LEAVE TO APPEAL DENIED BY SUPREME COURT OF ILLINOIS.)

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PETITION FOR WRIT OF CERTIORARI.

(PETITION FOR LEAVE TO APPEAL DENIED BY SUPREME COURT OF ILLINOIS.)

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

On *August 30, 1927*, the petitioner was awarded a judgment in condemnation for $11,500 against the respondent,

City of Chicago, for the taking of her property. In the same suit a special assessment was levied against her property for $1114.40 and on February 27, 1928, a deficiency was levied for $829.10 making a total of $1943.50, which sum was deducted from petitioner's award and she was then paid $9556.50 instead of $11,500.00.

The sum of $1943.50 was to be used for the sole purpose of widening and improving Taylor Street where petitioner's property was located.

Respondent, City of Chicago, admittedly never widened or improved the street.

On December 9, 1946, petitioner filed a suit in the Circuit Court of Cook County, Illinois, for the refund of said sum of $1943.50.

On January 22, 1947, the Circuit Court of Cook County entered an order sustaining petitioner's motion for summary judgment for the sum of $1943.50.

Respondent took an appeal to the Appellate Court of Illinois. While the appeal was pending the respondent first commenced the improvement on *May 20, 1947*. On *October 14, 1947* the improvement was completed.

The Appellate Court reversed and remanded the cause for hearing on the facts as to whether the City of Chicago had abandoned the improvement. The Appellate Court took into account facts occurring after judgment and not a part of the record.

Petitioner contended that a delay of more than 19 years in making an improvement was an abandonment as a matter of law. Petitioner also contended that commencing and completing the improvement *after* petitioner obtained her judgment is no ground for reversing the judgment. The Appellate Court also ordered this case

consolidated with several other cases which were filed after petitioner's case and the court considered matters not present in petitioner's case.

Petitioner moved to strike out the remanding part of the Appellate Court judgment in order to make this order final. That motion was allowed.

Petitioner filed a Petition for Leave to Appeal in the Supreme Court of Illinois which petition was denied on March 22, 1949. This petition for a writ of certiorari is to review the judgment of the Appellate Court.

Opinion Below.

The opinion of the Illinois Appellate Court which petitioner contends is erroneous is reported in 336 Ill. App. 126; 83 N. E. (2d) 23. This opinion is printed in full at the end of this petition as an appendix. The Supreme Court of Illinois denied leave to appeal without comment and without a written opinion.

Jurisdiction.

The basis upon which it is contended that this Court has jurisdiction is:

1. The petitioner has been deprived of property without due process of law in violation of the 14th Amendment to the Constitution. Paying $9556.50 for a $11,500.00 condemnation award is not "just compensation." The City of Chicago in deducting $1943.50 for a specific purpose and then waiting over 19 years without doing the work and retaining the money violated the 14th Amendment to the Constitution of the United States.

2. The action of the City of Chicago violates Section 10, Article I of the Constitution in that it impairs the obligation of a contract. When the City of Chicago deducted $1943.50 from petitioner's award in 1927, it did so for the express purpose and upon the express understanding that the money would be used solely to widen and improve Taylor Street. For 19 years this was not done. The Appellate Court, in effect, held that such conduct was proper and thus impaired the obligation of a contract.

3. Petitioner has been denied the equal protection of the laws of Illinois in violation of the 14th Amendment. In *Woodruff* v. *City of Chicago,* 394 Ill. 542, 69 N. E. (2d) 287, involving the same assessment, the very same street, and similar facts, the Supreme Court of Illinois held that the taxpayer was entitled to a refund. Since *Woodruff* v. *City of Chicago* was decided in 1946 in favor of the property owner, *a fortiori,* a year later where the street was still admittedly unimproved, this petitioner should have been allowed a refund.

Questions Presented.

1. Is 19 years an unreasonable length of time as a matter of law for a City to wait after it takes money from a taxpayer for making an improvement?

2. Is it unconstitutional to deprive a person of a judgment lawfully obtained upon facts or happenings occurring subsequent to judgment?

3. Is a special assessment improvement abandoned after nothing is done for over 19 years? If after a taxpayer sues for refund and obtains a judgment, can the improvement be revived so as to defeat the taxpayer's judgment for refund?

4. Is it constitutional for a City to abandon an improvement for 19 years and then after a taxpayer who has paid a special assessment to make this improvement has obtained a judgment for a refund, to commence and complete the improvement so as to defeat such judgment?

5. Is the payment of $9,556.00 for a $11,500.00 judgment in condemnation "just compensation?"

Why the Writ Should Be Allowed.

1. The decision of the Appellate Court of Illinois (as sustained by the Supreme Court of Illinois) had decided a substantive federal right contrary to the decisions of this court.

2. The decision of the Appellate Court of Illinois introduces a novel and unprecedented principle of judicial review, namely, that matters occurring subsequent to judgment and *dehors* the record, will be considered by a reviewing court.

3. The effect of the decision of the Appellate Court would mean that a municipality may take a taxpayer's money without ever making an improvement until a judgment had been obtained against it.

4. There are numerous other pending cases in Chicago, Illinois, which are awaiting a clear cut decision by this Court as to whether it is constitutional for a municipality to take a taxpayer's money by special assessment for a specific improvement, fail to make the improvement, for 19 years, have a judgment for refund entered against it and then defeat the judgment by subsequently making the improvement.

5. The petitioner has been deprived of "due process," has been denied "just compensation", and the City of Chicago has impaired the obligation of a contract in violation of petitioner's constitutional rights.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No.

FREDA GOODMAN,
Petitioner,

vs.

CITY OF CHICAGO,
a Municipal Corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

A delay of over 19 years in making an improvement constitutes an abandonment as a matter of law and the person who pays a special assessment for such improvement is entitled to a refund.

District of Columbia v. *Thompson*, 281 U. S. 25, 73 L. Ed. 677.

Woodruff v. *City of Chicago*, 394 Ill. 542, 69 N. E. (2d) 287.

Bradford v. *City of Chicago*, 25 Ill. 141 (1861).

McConville v. *City of St. Paul*, 75 Minn. 383, 77 N. W. 993, 443 L.R.A. 587, 74 Am. St. Rep. 508.

II.

Deducting a fixed amount from a condemnation judgment to make an improvement and then abandoning the improvement without refunding the amount deducted, violates the 14th Amendment to the Constitution of the United States and Article II, Section 13, of the Constitution of Illinois, and is not "just compensation."

Village of Norwood v. *Baker*, 172 U. S. 269, 43 L. Ed. 443.

Cohen v. *City of Chicago*, 377 Ill. 221, 36 N. E. (2d) 220.

People ex rel. Wanless v. *City of Chicago*, 378 Ill. 453, 38 N. E. (2d) 743.

III.

Petitioner raised the constitutional issue in the lower court, at the first opportunity in the Appellate Court, and also in the Supreme Court of Illinois (Abst. 19-23).

The Appellate Court in its opinion stated that petitioner made a conditional motion in our brief to transfer the case to the Supreme Court of Illinois on the ground that a constitutional issue was involved. Under Illinois law, only the Supreme Court can decide Constitutional issues. (Section 75, Illinois Civil Practice Act, Chap. 110, Illinois Revised Statutes, 1947.)

The record shows that on November 5, 1947, about six months before briefs were filed in the Appellate Court, petitioner made a motion to transfer the case to the Su-

preme Court of Illinois on the ground that a constitutional issue was involved (Abst. 19-21). This motion was denied by the Appellate Court.

In short, the petitioner raised the constitutional issue at the earliest opportunity as the transcript of record discloses.

Conclusion.

Petitioner submits that a grievous injustice has been done her. Basic constitutional principles have been violated. Petitioner's property and money were taken in 1927. This money was taken for one purpose only, namely, to widen and improve Taylor Street. This was never done. In January, 1947, petitioner obtained a judgment for a refund. In May, 1947, nearly *five months after the judgment* was obtained, the City of Chicago commenced the improvement—over 19 years later. We submit as a matter of law that 19 years is an abandonment. Yet, petitioner was deprived of her judgment by the Appellate Court considering matters which occurred after judgment and pending an appeal. It is earnestly urged that this Court grant this petition for certiorari.

Respectfully submitted,

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APPENDIX.

Opinion of the Appellate Court About Which Petitioner Complains.

(Reported in 336 Ill. App. 126, 83 N. E. (2d) 23.)

Mr. Justice Kiley delivered the opinion of the Court:

These are five actions to recover refunds of special assessments for a street improvement in Chicago and one action for a writ of *audita querela*. The trial court entered summary judgments for the plaintiffs in the special assessment actions and the City has appealed from each judgment. The City has also appealed from the judgment dismissing its complaint for a writ of *audita querela*. The six appeals have been consolidated in this court.

Plaintiffs are owners of real estate on the south side of Taylor Street between Canal and Halsted Streets in Chicago. The City, pursuant to a street widening ordinance in 1921, condemned 20 feet of the property on the south side of Taylor Street. The condemnation judgment was entered in 1927, and in 1928 judgment for awards to the property owners and assessments against the property for benefits were confirmed. In 1924 an ordinance to pave Taylor Street was passed but later abandoned. Subsequently, another ordinance was passed for paving the street but bids for the work exceeded the estimated cost. No contract was made and the work was not done. The City expended the special assessment funds collected from the properties, plus $43,000 of other City funds, to acquire the 20 foot strip. This acquisition was completed in 1938.

Joseph Woodruff, an owner of the Taylor Street property, commenced suit to recover assessments paid by him for the Taylor Street improvement and for the

widening of Jefferson Street in Chicago. He had judgment in the trial court for the Taylor Street assessment but judgment was against him for the Jefferson Street assessment. This court reversed the judgment in his favor for the Taylor Street assessment, and affirmed the Jefferson Street judgment. *Woodruff* v. *City of Chicago*, 326 Ill. App. 577. The Supreme Court reversed the judgment of this court as to Taylor Street and affirmed the Jefferson Street judgment (394 Ill. 542). The reports of those cases may be referred to for a fuller statement of the case than we feel required to give in this opinion.

The Supreme Court judgment in the *Woodruff* case became final in November of 1946. The instant suits to recover assessments were filed between December 9, 1946 and March 7, 1947. They rested upon the decision in the *Woodruff* case. Plaintiffs claim that the Supreme Court's finding in the *Woodruff* case that the Taylor Street improvement had been abandoned by the City is binding in these cases, and that the City refused to return or use the assessments for the purposes of the improvement for which they were levied and collected and, accordingly, holds the funds as trustee.

Following the entry of the last summary judgment in the instant assessment cases, on October 30, 1947 the City filed its complaint for a writ of *audita querela* to satisfy the judgments. The ground of complaint was that since the judgments had been entered, Taylor Street had been widened, paved and the improvement completed. On plaintiffs' motion this complaint was stricken. The City elected to stand on the complaint and the complaint was dismissed.

The basic question is whether the counter affidavits of the City in the suits to recover assessments presented issues of fact on the element of abandonment. If the finding in the *Woodruff* case is binding in the instant suits, there was no question of fact and the summary judgments were proper.

The facts in the *Woodruff* case were the improvement ordinance of 1921 and the condemnation proceed-

ings thereunder; the special benefit assessments paid by Woodruff in 1928; the action of the City Council repealing the 1924 pavement ordinance; the passage of a new paving ordinance in 1927; the confirmation of the condemnation judgment in 1930; the taking of bids in August, 1930, which exceeded the estimates; the failure to collect assessments for the paving of Taylor Street; the designation of Taylor Street in 1940 as an arterial highway and the allocation of $100,000 from the Motor Fuel Tax Fund for the improvement; and the failure to use any of the fund or to prepare complete plans on which to let a contract for the work. The City defended on the ground that the improvement could not be carried out because of the economic depression and a City official testified that the City intended to complete the improvement when the opportune time came. The Supreme Court stated that the law contemplated reasonable dispatch in carrying out public improvements and that the economic depression was no excuse; that assessments are recoverable when the improvement is abandoned; and that the lack of an effective paving ordinance and lack of a fixed time for making the improvement were unmistakable indications of a lack of "present intention" to do the work. It concluded that the Taylor Street improvement had been abandoned and that since the Jefferson Street improvement was completed during the pendency of this suit, there could not be a finding that that improvement had been abandoned.

The City's counter affidavit in the *Goodman* case was filed January 22, 1947. It set out in addition to the facts recited in the *Woodruff* case that during World War II, materials for the improvement were subject to priority and were not procurable; that December 17, 1946, the City Council passed an additional appropriation of Motor Fuel Tax Funds for paving Taylor Street; that plans and specifications had been submitted to the State Highway Department for approval; and that on January 10, 1947 the City Council authorized the taking of bids. The affidavit in the *Weinheimer* case was filed February 17, 1947. It contained substantially the fore-

going facts and in addition the fact that on November 30, 1943, the War Production Board denied authority to the City to proceed with the improvement; that the Commissioner of Public Works had authorized publication of an advertisement for bids on February 15, 17, 18, 19 and 20, 1947; and that it was contemplated that the bids would be opened February 27. The counter affidavit in the *Maxwell* case was filed April 28, 1947. In addition to the foregoing facts it stated that the plans submitted to the State Highway Department had been approved, bids taken and a contract made with McDuffie, Brown & Brophy; that the contract calls for the completion of the improvement by November 1, 1947; and the contractors' bond has been filed. The counter affidavit in the *Swift* case was filed June 2, 1947. In addition to the foregoing it, and an additional affidavit, stated the additional facts that on May 20, 1947 the contractor had begun breaking vaulted sidewalks for the purpose of constructing retaining walls; and estimated that the street would be readied for paving about June 20 and would be completed November 1, 1947. In the *Collins* case a supplemental counter affidavit was filed by the City on October 3, 1947. In addition to the foregoing it stated the additional facts; that the paving had been completed and the roadway had been opened for traffic.

It is admitted in this court that the improvement was completed and open for traffic October 14, 1947. It is argued that this was after summary judgments were entered. The relation of the completion date to the judgment dates is unimportant. It is conceded that the special assessment proceeding for Taylor Street had been abandoned. The question is whether the counter affidavits raise triable issues of fact on the question of abandonment of the improvement.

We think that the counter affidavits removed these cases from the effect of the *Woodruff* case. There may be room for argument on the *Goodman* case. We cannot say, as a matter of law, however, that the intervention of the war, rendering materials unprocurable,

was not an excusable delay, or that the additional appropriation of Motor Fuel Funds and the approval of specific plans by the State Highway Department authorizing the taking of bids did not indicate "a present intention" to go ahead with the work. In the *Woodruff* case the defense of excusable delay was based on economic factors and there were no complete plans prepared for the improvement upon which a contract could be let. We think that the Supreme Court might have taken a different view of the *Woodruff* case had these additional facts been present here. *Rudin* v. *King-Richardson Co.*, 276 Ill. App. 46.

Because the special assessment proceeding for paving was abandoned, it does not follow that the money collected for the widening was not used. The City's affidavits stated that the fund collected had been used to acquire the property. Passage of time alone is not the test of abandonment of an improvement. This is clear from the cases cited by the plaintiffs. *Bradford* v. *City of Chicago*, 25 Ill. 411; *McConville* v. *City of St. Paul*, 77 N. W. (Minn.) 993; *Valentine* v. *City of St. Paul*, 26 N. W. (Minn.) 457; *City of San Antonio* v. *Peters*, 40 S. W. (Texas) 827; *District of Columbia* v. *Thompson*, 281 U. S. 25. Our view of the instant cases is not inconsistent with the views of the courts on the facts in the cases cited. Those cases are distinguishable from the instant cases for the reasons given in *Boss* v. *District of Columbia*, 134 Fed. (2d) 14.

It is not necessary for the City's affidavits to show actual work done under the contract, nor enough in itself for plaintiffs to allege that the street was in the same condition at judgment time as it was when the *Woodruff* case was decided. The City's affidavit in the *Collins* case stated that the work had commenced. It might be argued that we should take the same view as the Supreme Court of the delay prior to World War II. The answer is that the *Woodruff* case was filed before the war, whereas, here the delay caused by the war has intervened. In this connection the City points

out that before the earliest of these cases had been filed in December 1946, plans for paving Taylor Street had been approved by the State Highway Department.

It is our conclusion that the City's counter affidavits presented triable issues of fact and that the summary judgments were unwarranted. Because of this opinion it follows that we should dismiss without prejudice the appeal from the judgment dismissing the complaint for the writ of *audita querela.*

Plaintiffs presented a conditional motion in their brief that, in the event we hold *Woodruff* v. *City* not controlling, we should transfer the cause to the Supreme Court. We cannot transfer a cause after entering judgment.

Plaintiffs argue that, in any event, the judgment should be affirmed under section 13 of Article II of the Constitution of Illinois. We see no merit to this contention. Plaintiffs alleged they had not received just compensation for their property because the special assessment deducted from the awards had not been used for the purpose for which the assessment was levied. This allegation did not present a constitutional question, but a question of fact as to the use of the money. *Chapralis* v. *City of Chicago,* 389 Ill. 269. The trial court presumably found that the money had not been used for the proper purpose. We find that the court was in error in entering the summary judgment.

For the reasons given the summary judgments are reversed and the causes are remanded for a trial of the issues of fact raised by the counter affidavits of the City. The appeal from the judgment dismissing the complaint for writ of *audita querela* is dismissed, without prejudice.

The Appeal in 44381 is Dismissed, Without Prejudice. Judgments in Cases Nos. 44167, 44185, 44231, 44236 and 44380 are Reversed and the Causes Remanded.

Burke, P. J. and Lewe, J. Concur.

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SEP 7

CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 578 1311

FREDA GOODMAN,
Petitioner,

vs.

CITY OF CHICAGO,
a Municipal Corporation,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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It is admitted by respondent that when petitioner obtained her judgment for refund in this case on January 22, 1947, the physical condition of Taylor Street was precisely the same as it was on February 27, 1928, when the amount of the special assessment was deducted from her condemnation award. Not a shovelful of earth had been turned nor had one inch of street been widened 4

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 878

FREDA GOODMAN,
Petitioner,

vs.

CITY OF CHICAGO,
a Municipal Corporation,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Your petitioner, Freda Goodman, in reply to the brief of the respondent, City of Chicago, a Municipal Corporation, states that there is a clear federal constitutional question involved and that this Court should grant certiorari on the following grounds:

I.

"Due Process" requires "just compensation" and deducting a fixed amount from a condemnation award for the sole purpose of making a special assessment improvement and then not making the improvement until over 19 years later and after a judgment for refund has been obtained is not "just compensation".

The respondent, City of Chicago, argues on pages 1 and 2 of its brief, that there is no constitutional issue involved and therefore no basis for this Court assuming jurisdiction because the petitioner in February 1928, when she was awarded her compensation by the jury, permitted the sum of $1943.50 to be deducted from her award for the sole and express purpose of widening and improving Taylor Street. Respondent therefore argues that petitioner thereby waived her right to complain about not receiving "just compensation".

Such reasoning is palpably fallacious. Of course, in 1928 the petitioner permitted the City of Chicago to deduct a certain amount from the condemnation award for the sole and express purpose of widening and improving Taylor Street. This work was not even commenced until more than 19 years later and after plaintiff obtained her judgment in this case. The petitioner could not assume (or even imagine in her wildest dreams) that the City of Chicago would retain this special assessment moneys and not even commence the improvement until over 19 years later after this petitioner obtained her judgment for refund. This money deducted from petitioner was a trust fund and could only be used for the trust purpose, namely, to widen and improve Taylor Street. *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 183 N. E. 337; *Woodruff* v. *City of Chicago*, 394 Ill. 542, 551, 69 N. E. (2d) 287.

It seems incredible that the City of Chicago should now set up its own misuse of trust funds and its own dilatory action as a defense. It was not until the City of Chicago repudiated and breached its solemn trust and abandoned the project that petitioner could raise the constitutional question of "due process" and "just compensation". If the City of Chicago had made the improvement and carried out its trust, no constitutional question could or would be raised. Indeed, if a private individual had done what the City of Chicago has done in this case, namely, taking a property owner's money for a specific purpose and then keeping the money and not performing its trust, he would long ago have been sentenced to the penitentiary for practicing a confidence game.

Respondent cites *Cohen* v. *City of Chicago*, 377 Ill. 542, 36 N. E. (2d) 743 in support of its contention that there is no constitutional question involved here. That case holds no such proposition. On the contrary *Cohen* v. *City of Chicago* expressly requires full compensation including interest. At page 232, the Supreme Court of Illinois laid down the rule:

> "When the judgments were entered, fixing the compensation to be paid for the property taken, appellants were entitled to have the *full amounts of those judgments paid to them.* They were not only entitled to have these judgments paid in full, but, under section 3 of the Interest Act, (Ill. Rev. Stat. 1939, chap. 74, par. 3,) and under the decisions of this court in *Turk* v. *City of Chicago*, 352 Ill. 171, and *Feldman* v. *City of Chicago*, 363 id. 247, they were entitled to receive interest on said judgments at the rate of five per cent per annum from the date the judgments were entered until they were paid in full." (Italics ours.)

We submit that the statement of this court in *Chicago, Burlington & Quincy Ry. Co.* v. *Chicago,* 17 S. Ct. 581, 166 U. S. 241, 41 L. Ed. 979, at page 986, is most germane as to whether a constitutional question is involved:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

II.

It is admitted by respondent that when petitioner obtained her judgment for refund in this case on January 22, 1947, the physical condition of Taylor Street was precisely the same as it was on February 27, 1928, when the amount of the special assessment was deducted from her condemnation award. Not a shovelful of earth had been turned nor had one inch of street been widened.

The City of Chicago further argues on page 2 of its brief that the factual situation is different from what it was when *Woodruff* v. *City of Chicago,* 394 Ill. 542, 69 N. E. (2d) 285, was decided in 1946. But nowhere is that difference pointed out. There is and was no such difference.

We state to this court as an uncontradicted fact that the physical condition of Taylor Street was the same when summary judgment was entered in January 1947, as it was when *Woodruff* v. *City of Chicago* was decided by the trial court in 1944 (Tr. 2, 13).

In fact, the City of Chicago in its answer (Tr. 8) sets up the Statute of Limitations as a defense. Not one single inch of street had been widened and not one shovelful of earth had been moved when petitioner herein obtained her judgment. Not one bit of work was done for over 19 years.

III.

"Just compensation" was denied petitioner when the improvement was abandoned and when the City of Chicago refused to refund the moneys collected.

Respondent argues on pages 2 and 3 of its brief that the claim that the constitutional provisions of "due process" and "just compensation" were not made until petitioner made her motion for summary judgment in the trial court (Tr. 9).

Obviously, until the City refused to make the refund no such claim could be made. When the City of Chicago filed its answer stating it would not refund petitioner the balance of her condemnation award, then, and then alone, did the constitutional issue arise. Petitioner raised the constitutional issue in the motion for summary judgment, in the Appellate Court of Illinois requesting that the case be transferred to the Supreme Court, because a constitutional issue, "just compensation", was involved, (Tr. 19-20) and again in the Supreme Court of Illinois (Tr. 29). At every stage of the case did petitioner raise the constitutional question.

Respondent further argues on page 3 of its brief that "just compensation" does not come within the scope of the 14th amendment. This contention is palpably erroneous and is directly contrary to *Chicago, B. & Q. Ry. Co.* v. *Chicago,* 17 S. Ct. 581, 166 U. S. 241, 41 L. Ed. 979.

It is difficult to comprehend the ethics or morality of respondent's reasoning that taking money for a particular purpose and then not carrying out the purpose is legitimate and honorable conduct. Performing the work more than 19 years later and after petitioner obtained a judgment for refund, to our mind, does not cure this wrongful conduct.

IV.

The Taylor Street special assessment project was definitely abandoned and the Supreme Court of Illinois so found in Woodruff v. City of Chicago, 394 Ill. 542.

On pages 4-6 of its brief, City of Chicago argues that it never really abandoned the improvement. The answer to this contention is simple.

First, a delay of 19 years is an abandonment as a matter of law. In *Bradford* v. *City of Chicago,* 25 Ill. 141, a delay of 4 years was held to be an abandonment. In *McConville* v. *City of St. Paul,* 75 Minn. 383, 77 N. W. 993, 43 L.R.A. 584, 74 Am. St. Rep. 508, 6 years was held to be an abandonment. In *District of Columbia* v. *Thompson,* 281 U. S. 25, 75 L. Ed. 677, 14 years' delay was held to be an abandonment. *A fortiori,* a delay of nearly 19½ years is certainly an abandonment.

Second, the Appellate Court of Illinois in its own opinion admitted that the special assessment proceeding had been abandoned (Petition for Certiorari, page 15). The Court said in this case in *Goodman* v. *City of Chicago,* 336 Ill. App. 126, 83 N. E. (2d) 23, at page 132:

"*Because the special assessment proceeding for paving was abandoned,* it does not follow that the money collected for the widening was not used." (Italics ours.)

Even the Appellate Court was in doubt as to its conclusion. For the court said (page 14 Petition for Certiorari):

"There may be room for argument on the *Goodman* case."

The improvement was commenced and completed after petitioner obtained her judgment from Motor Fuel Tax funds supplied by the State of Illinois and not from petitioner's money at all. (Respondent's Brief, page 5.) Thus, petitioner is paying twice for the improvement—commenced 19 years late—as a taxpayer and by deducting from her condemnation award. If getting the improvement over 19½ years late is proper and constitutional then a municipality may wait 30 or 40 or 50 years before it decides to use moneys it collects for a particular purpose for *that* purpose. Respondent's contention is absurd and would not be countenanced by this or any other court if a private individual were to do what the City of Chicago did here.

This special assessment improvement as contemplated was definitely and irrevocably abandoned.

V.

The failure to make the improvement as agreed and the Illinois Courts' action in condoning such failure impairs the obligation of a contract.

The City of Chicago and this petitioner had a definite contract that the City would make the improvement within a reasonable time and petitioner permitted the City of Chicago to deduct a certain amount from her condemnation award for this purpose only. The City of Chicago refused to carry out its agreement and the Illi-

nois Courts have said in this case that the City does not have to complete the improvement and it may still retain the trust moneys committed to it for a specific purpose. In effect, the Illinois courts have said that the City of Chicago may breach a trust or contract with immunity and impunity.

We submit that this is state action which violates Section 10, Article 1 of the Constitution.

VI.

Petitioner has been denied the equal protection of the laws of Illinois in violation of the 14th Amendment.

In *Woodruff* v. *City of Chicago,* 394 Ill. 542, 69 N. E. (2d) 287, decided in September 1946, the Illinois Supreme Court held that this same Taylor Street improvement had been abandoned and allowed Woodruff to recover the moneys paid by him to the City of Chicago as a special assessment.

Two years later, with the same street, the same physical condition of the street, the same set of facts, this petitioner is denied recovery. If the City of Chicago had during the interim from the *Woodruff* decision to the date judgment was entered in this case done one dollar's worth of work on the improvement, there might be some merit to respondent's contention. But *nothing* was done until after judgment was entered.

Certainly, the same set of facts and the same legal situation requires the same decision. Surely, a court cannot decide a case one way and an identical case another way without stating that it was reversing itself. In this case, the Appellate and Supreme Courts of Illinois deprived petitioner of her basic constitutional rights al-

though another taxpayer was given his rights. "Equal protection" means "equal protection" to all persons in the same situation.

CONCLUSION.

This court has jurisdiction of this cause because four fundamental constitutional principles have been violated, to-wit, "due process", "just compensation", "impairment of contract", and "equal protection".

If the City of Chicago can breach a trust and keep moneys that do not belong to it, then any private individual may do the same. A grave injustice has been done; a vital fundamental principle of law has been ignored; important constitutional doctrines have been violated.

Permitting the Illinois rulings to stand would mean that municipalities could deprive persons of property with immunity and would establish a precedent for collecting without performing. If this court grants certiorari we are confident we can then show conclusively how far-reaching are the consequences of the decision in this case.

Hence for the reasons assigned in our petition for certiorari and in this reply brief, it is earnestly urged that this court grant the petition for a writ of certiorari.

Respectfully submitted,

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Chicago, Illinois,
Attorney for Petitioner.

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JUL 18 1949

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 131

FREDA GOODMAN,

Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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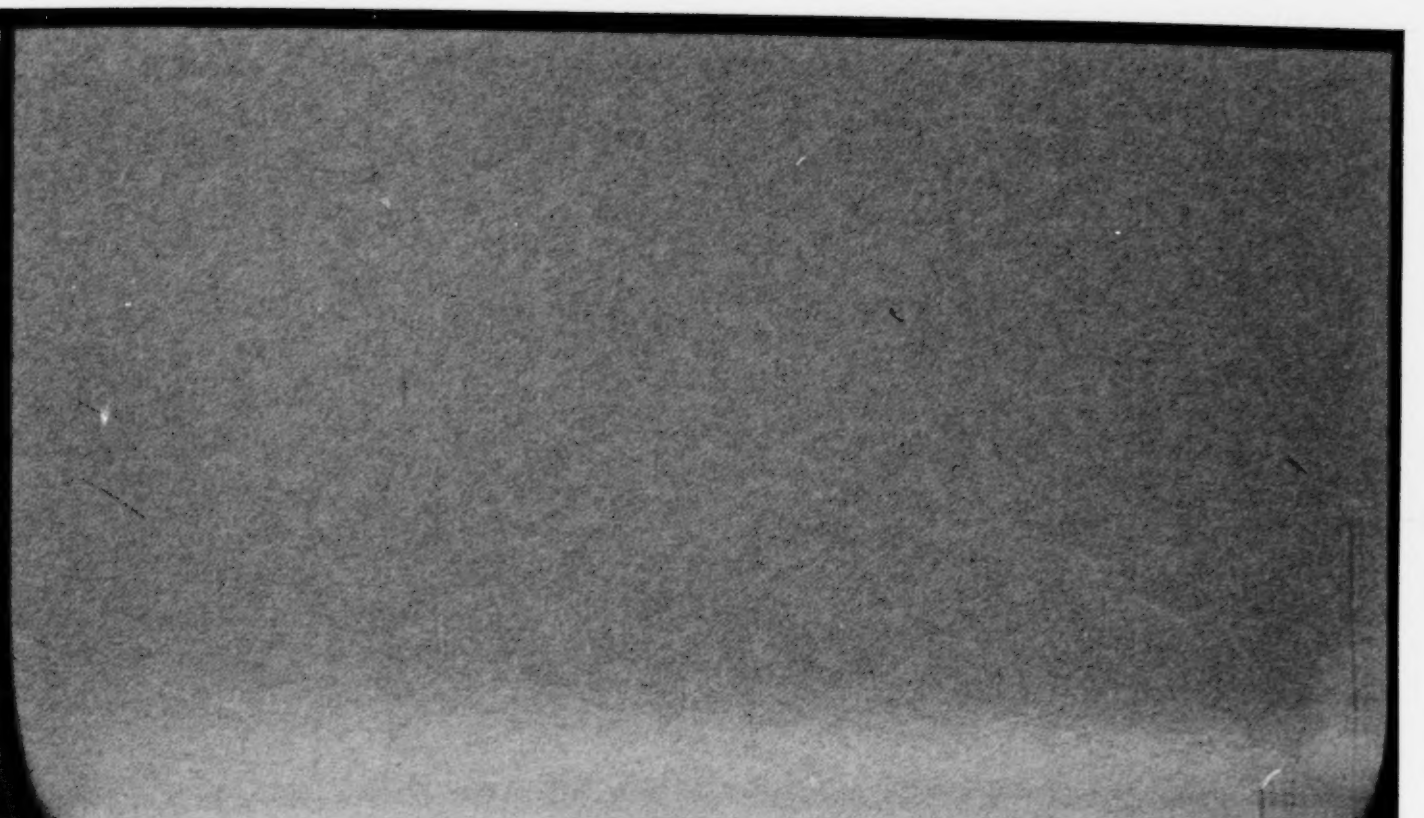

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 878

FREDA GOODMAN,

Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondent, City of Chicago, a municipal corporation, opposes the petition for certiorari on the following grounds:

I.

No basis for assumption of jurisdiction by this court is present in this case.

The petitioner confuses and commingles an argument based on the deduction from an award in condemnation of a special assessment with an argument based on a claim

for refund of the special assessment on the ground that the improvement for which the special assessment was levied and paid has been abandoned. The two bases are in no way connected, and the joining of them can serve no useful purpose. It has been held by the Supreme Court of Illinois, that the right to receive an award in condemnation without diminution for special assessments may be waived, and if the property owner accepts the award and permits the deduction of the special assessment he is estopped to assert any claim and is held to have accepted the payment in full satisfaction of his claim. *Cohen* v. *City of Chicago,* 377 Ill. 221, sets forth in detail the manner in which these payments were made and the rules of law applicable thereto.

Actually, petitioner makes no claim for refund of the special assessment deducted from the award, except that the improvement was abandoned. The claim of abandonment of improvement is based on the case of *Woodruff* v. *Chicago,* 394 Ill. 542. But the decision in the instant case in the Appellate Court of Illinois, 336 Ill. App. 126, discloses that the record made in this case shows that events which took place after the *Woodruff* case was tried indicate a factual situation which so differed from that at the time of the *Woodruff* trial as to take it out of the effect of that decision. That the Supreme Court of Illinois reached the same conclusion is evident from its denial of the petition for leave to appeal in this case.

Petitioner's point 1, under the heading "Jurisdiction," is manifestly unsound because the complaint (Tr. 1-3) claims a refund of the assessment only on the strength of the *Woodruff* case holding that the improvement was abandoned. The claim that just compensation was denied was not made until the motion for summary judgment

(Tr. 9). Any claim based on the deduction of the assessment from the award would be barred by the *Cohen* case holding that the judgment creditor is estopped to deny that the condemnation award was satisfied. The only basis for relief apparent in the complaint is based on abandonment of the improvement. Plaintiff is in no position to complain that a constitutional right to just compensation has been violated by her own acceptance of payment without objection or complaint. No question of just compensation for property taken is involved here.

Petitioner's second jurisdictional point (p. 4) argues that the delay in completing the improvement impairs the obligation of a contract. This argument constitutes a change of face on petitioner's part because the very *Woodruff* decision, on which she predicated her claim, held that completion of the improvement, even after suit had been instituted, was a defense to the claim for refund. It should also be noted that this point was not raised in the trial court. The motion for summary judgment, the first time any Federal constitutional point was mentioned, alleges only that the failure of the city to use the money deducted from the award violates the 14th Amendment (Tr. 9, par. 3), and in paragraph 11 of the motion (Tr. 12) plaintiff alleges that the failure of the city to use the money for improving Taylor Street constitutes a taking of property without just compensation in violation of the 14th Amendment.

From this it is apparent that the only question submitted to the trial court, under the Federal Constitution, was that of "just compensation." The Appellate Court pointed out (Pet. p. 16) that this allegation did not present a constitutional question, but rather, a question of fact as to the use of the money, relying on *Chapralis* v. *City of Chicago,* 389 Ill. 269.

Petitioner is in no position to complain on any score because, as the Appellate Court points out, the improvement has been completed and she has received the benefit of the money she was assessed. In fact, she has received much more than she paid for.

From the *Woodruff* opinion (394 Ill. at p. 545) it will be seen that the city assessed the owners of property along Taylor Street for the cost of acquiring the additional land needed for widening the street, but none of the assessments for the improvement *by paving* Taylor Street have ever been placed in collection or paid. From the Appellate Court opinion in the instant case it appears (Pet. pp. 13-14) that Taylor Street was paved out of Motor Fuel Tax funds. The petitioner has, it will be seen, received an improvement consisting of a widening and paving yet has been assessed only for the acquisition of the land necessary for widening but has never been assessed or asked to pay for the completion of the improvement—the paving thereof. It will therefore be seen that she received much more than she paid for, yet she seeks the refund of that small portion of the cost of the improvement which she did pay.

No Federal question relating to impairment of contract was ever raised or passed upon by the State court. "A mere denial of the petition by the state court, without opinion, is not enough" to justify the assumption of jurisdiction by this court. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 455, 68 L. ed. 387. Furthermore, this case does not involve any law passed by the state, but only a judgment of the court based on local law, and this court has therefore no basis in this record for assuming jurisdiction by virtue of any claim under Section 10, Article I of the Constitution.

Petitioner's third jurisdictional point rests on the basis that she has been denied the equal protection of the laws

because Woodruff, in the case referred to, obtained a judgment directing a refund. The instant case was heard on a different factual showing. Here the court was aware of the fact that the improvement, far from having been abandoned, as the *Woodruff* case held, was actually completed. On this factual showing, the Appellate Court reversed the summary judgment entered by the Circuit Court and remanded the cause for trial on the factual issue of abandonment. The Supreme Court denied petition for leave to appeal.

The mere fact that Woodruff, on one factual situation, recovered, does not deprive petitioner of the equal protection of the laws because the changed facts preclude recovery by her.

The record in this case discloses no abandonment of the improvement, in fact, it shows that the improvement has been completed. Abandonment, under the authorities, is a matter of intention. In *District of Columbia* v. *Thompson*, 281 U. S. 25, 73 L. ed. 677, cited by petitioner (Pet. 7) this court emphasized the absence in the pleadings and proof of a desire or intention to make the public improvement at any future time. Because of the absence of such desire or intention in the pleadings and proof, this court held the improvement abandoned. But in *Boss* v. *District of Columbia*, 134 Fed. (2) 14, notwithstanding the delay, the improvement was finally completed by the time of the trial. The court held that there was no abandonment or intention to abandon and held against the plaintiff's claim for refund.

McConville v. *City of St. Paul*, 75 Minn. 383, 77 N.W. 993, cited by petitioner (p. 8) is distinguishable on the same ground, and the same is true of *Bradford* v. *City of Chicago*, 25 Ill. 141, cited in the petition (p. 8). There the

court pointed out that the special assessment was paid on a void assessment roll, that (p. 352) the improvement could not be carried out on the void assessment, that "it being void avoids the whole undertaking, and is equivalent to an actual abandonment."

These cases were analyzed and distinguished in the *Boss* case. The law is clear that evidence of abandonment must be clear and convincing. Even a non-user of a road for a long period of time has been held not to be conclusive evidence of abandonment. *Cox* v. *Commissioners of Highways,* 194 Ill. 355, 360; *Durfee* v. *P. D. & E. Ry. Co.,* 140 Ill. 435, 439. There must not only be an apparent abandonment but the intention to abandon must be clearly and satisfactorily proved. *Shirk* v. *City of Chicago,* 195 Ill. 298, 313.

This record discloses that far from being abandoned the improvement has been completed. Neither the facts nor the law indicate any reason for this court to allow certiorari in this case.

CONCLUSION.

It is evident from what we have hereinbefore discussed that the jurisdictional propositions here relied upon by petitioner as a basis for this court's assumption of jurisdiction are unsound. The facts show no abandonment of the improvement which could possibly form a foundation for petitioner's claim that her constitutional rights have been violated either on the ground of "just compensation", "due process", or "impairment of contract".

We respectfully submit that no Federal constitutional question is involved and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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